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No. 88-723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARK JENKINS,

Petitioner,

v.

GEORGIA POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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10 pp

QUESTION PRESENTED

Is a question of state tort law involving no federal constitutional issues which has been decided by the highest state court in which a decision could be had as of right of sufficient importance to warrant review by this Court?

LIST OF AFFILIATED CORPORATIONS

Respondent Georgia Power Company is a wholly owned subsidiary of The Southern Company, a publicly held corporation which is traded on the New York Stock Exchange.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF AFFILIATED CORPORATIONS	ii
JURISDICTION	1
STATEMENT OF THE CASE	2
REASONS WHY THE PETITION SHOULD BE DENIED	2
I. THE DISTRICT AND CIRCUIT COURTS CORRECTLY HELD THAT ELECTRICITY IS NOT AN ULTRA-HAZARDOUS SUBSTANCE UNDER GEORGIA LAW	2
II. THIS COURT SHOULD NOT CERTIFY OR REMAND WITH DIRECTIONS TO CERTIFY BECAUSE THE COURTS BELOW APPLIED AND FOLLOWED CLEAR CONTROLLING PRECEDENT	4
CONCLUSION	5

TABLE OF AUTHORITIES

	Page
CASES:	
Allen v. Cooper, 145 Ga. App. 555, 244 S.E.2d 98 (1978)	3
Community Gas Co. v. Williams, 87 Ga. App. 68, 73 S.E.2d 119 (1952)	3,4
Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)	2
Georgia Power Co. v. Gillespie, 49 Ga. App. 78, 176 S.E. 786 (1934)	2,3,4
Georgia Power Co. v. Maxwell, 52 Ga. App. 430, 183 S.E. 654 (1935)	3
Haring v. Prosise, 462 U.S. 306 (1983)	3
Hodge v. United States, 310 F. Supp. 1090 (M.D. Ga. 1969), *aff'd*, 424 F.2d 545 (5th Cir. 1979)	3
Horn v. C.L. Osborn Contracting Co., 423 F. Supp. 801 (M.D. Ga. 1976), *rev'd*, 591 F.2d 318 (5th Cir. 1979)	3
Jenkins v. Georgia Power Co., 668 F. Supp. 1574 (N.D. Ga. 1987), *rev'd*, 849 F.2d 507 (11th Cir. 1988)	3
Stoner v. New York Life Ins. Co., 311 U.S. 464 (1940)	4
West v. American T&T Co., 311 U.S. 223 (1940)	4
STATUTES AND CONSTITUTIONAL PROVISIONS:	
Article VI, Section V, Paragraph III of the Georgia Constitution of 1983	4
28 U.S.C. § 1332	1
28 U.S.C. § 1254(1)	2
MISCELLANEOUS:	
Rule 37(a), Georgia Supreme Court	4

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The Respondent Georgia Power Company respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 849 F.2d 507 (11th Cir. 1988).

JURISDICTION

Invoking federal jurisdiction based upon diversity of citizenship pursuant to 28 U.S.C. § 1332, the petitioner brought this suit alleging negligence in connection with a personal injury in the Northern District of Georgia, Atlanta Division. The disposition of this matter in the Northern

District and the Eleventh Circuit is set forth in the petition for a writ of certiorari.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent respectfully directs the Court's attention to the statement of the facts in the Eleventh Circuit's opinion, which it incorporates herein by reference, for an accurate statement of all of the facts material to consideration of the question presented.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE DISTRICT AND CIRCUIT COURTS CORRECTLY HELD THAT ELECTRICITY IS NOT AN ULTRA-HAZARDOUS SUBSTANCE UNDER GEORGIA LAW.

The sole Question Presented in the petition (p. i) is whether the Eleventh Circuit so erred in its application of Georgia law that this Court's supervisory jurisdiction is called for. The answer to this question is no, because the Eleventh Circuit properly followed and applied state law in this diversity case in accordance with the principle of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

The courts below recognized that Georgia tort law holds that electricity is not so ultra-hazardous a substance as to automatically implicate the inherently dangerous work doctrine. In *Georgia Power Co. v. Gillespie*, 49 Ga. App. 788, 794, 176 S.E. 786 (1934), the Georgia Court of Appeals held, "[w]e are unwilling to hold that electricity is a substance so inherently dangerous that a power company may not contract for the building of power lines with an independent contractor

and absolve itself from liability for an injury which occurs solely because of the negligence of such independent contractor in the doing of the work." The courts below correctly applied this principle to reject petitioner's argument that respondent is liable for the negligence of petitioner's independent contractor employer. *Jenkins v. Georgia Power Co.*, 668 F. Supp. 1574, 1577 n. 1 (N.D. Ga. 1987), *rev'd on other grounds*, 849 F.2d 507, 509 (11th Cir. 1988).

Contrary to Petitioner's representation to this Court, *Gillespie* is not an aberration standing in splendid isolation but rather has been cited and followed by both Georgia courts and federal courts applying Georgia law. *E.g., Horn v. C. L. Osborn Contracting Co.*, 423 F. Supp. 801, 809 (M.D. Ga. 1976), *rev'd on other grounds*, 591 F.2d 318 (5th Cir. 1979); *Hodge v. United States*, 310 F. Supp. 1090, 1101 (M.D. Ga. 1969), *aff'd*, 424 F.2d 545 (5th Cir. 1970); *Allen v. Cooper*, 145 Ga. App. 555, 556, 244 S.E.2d 98 (1978); *Georgia Power Co. v. Maxwell*, 52 Ga. App. 430, 434, 183 S.E. 654 (1935). The case cited by Petitioner as redefining the *Gillespie* doctrine, *Community Gas Co. v. Williams*, 87 Ga. App. 68, 73 S.E.2d 119 (1952), merely distinguishes *Gillespie* and does not overrule it. Since *Williams* was decided, the courts have continued to cite *Gillespie* as support for the principle that an employer is not liable for the torts of his independent contractor where work which is not inherently dangerous of itself becomes dangerous when performed negligently. *E.g., Horn v. C. L. Osborn, supra; Hodge v. United States, supra; Allen v. Cooper, supra.*

There is, accordingly, no basis for the exercise of this Court's extraordinary power of supervision, since the decision below follows clear precedent and this Court generally "accept[s] a reasonable construction of state law by the court of appeals." *Haring v. Prosise*, 462 U.S. 306, 314 n. 8 (1983). Respondent respectfully submits that this is not a case requiring reconsideration on the merits.

II. THIS COURT SHOULD NOT CERTIFY OR REMAND WITH DIRECTIONS TO CERTIFY BECAUSE THE COURTS BELOW APPLIED AND FOLLOWED CLEAR CONTROLLING PRECEDENT.

Federal courts are bound by the decisions of a state's intermediate appellate court unless there is persuasive evidence that the highest state court would rule otherwise. *E.g., Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940); *West v. American T&T Co.*, 311 U.S. 223 (1940). The decision of the Georgia Court of Appeals in *Gillespie* is a controlling precedent by an appellate court which is binding on all Georgia courts except the Supreme Court of Georgia. Article VI, Section V, Paragraph III of the Georgia Constitution of 1983.[1] Because a clear controlling decision by the Georgia Court of Appeals exists, there is no basis for certification under the plain language of Georgia Supreme Court Rule 37(a). See, Petition for Certiorari at 4-5.

Petitioner's assertion that "[t]he authority of *Gillespie* is undercut by *Williams*, leaving no clear controlling precedent" conveniently ignores all those cases following *Gillespie* since *Williams* was decided. Petition for Certiorari at 5. As shown above, *Gillespie* is good law which the Georgia Court of Appeals, the Georgia district courts, the Fifth Circuit Court of Appeals, and the Eleventh Circuit Court of Appeals continue to cite and follow. Hence, no basis exists for certifying the question posed by petitioner to the Georgia Supreme Court inasmuch as a line of authority citing *Gillespie* has considered and decided the issue adversely to petitioner.

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[1] The Georgia Constitution of 1983 provides in relevant part as follows: "The Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law. The decisions of the Court of Appeals insofar as not in conflict with those of the Supreme Court shall bind all courts except the Supreme Court as precedent."

CONCLUSION

The issue raised by the instant petition presents a question of state tort law which is not of sufficient importance beyond the litigants themselves to warrant review by this Court. The courts below followed an unbroken line of authority and correctly rejected petitioner's argument that his work was inherently dangerous as contrary to the law of Georgia. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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